2007

Richard D. Prichard v. Utah Labor Commission : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

RICHARD PRICHARD, Petitioner, vs. K-MART and the UTAH LABOR COMMISSION, Respondents.	**RESPONSE BRIEF OF K-MART** Case No. 20070913-CA **(Oral Argument Requested)**

PETITION FOR REVIEW FROM THE LABOR COMMISSION OF UTAH

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because it failed to evaluate his residual functional capacity. Specifically, Prichard emphasized that no mention is made in the report of any functional capacity evaluation performed by the panel. The essence of Prichard's argument is that a medical professional cannot issue work restrictions without conducting a functional capacity evaluation.[2] However, Prichard offers no support for this novel argument. Indeed, based upon Prichard's argument, the work restrictions issued by Dr. Bova, Dr. Chung, and Dr. Bender, upon which he relies for his claim to permanent total disability, would also be disregarded on the basis that those physicians did not perform any functional capacity evaluations prior to issuing restrictions. The Medical Panel's conclusion with respect to Prichard's work restrictions was based upon its experience, its examination of Prichard and a review of all of the medical evidence. The Commission's determination to adopt such conclusion was reasonable and appropriate. Accordingly, Prichard's argument regarding the necessity for conducting a functional capacity evaluation should be disregarded.

Additionally, Prichard argues that the Medical Panel's conclusion regarding work restrictions should be disregarded because there was no conclusion as to whether he could perform his work functions continuously over an 8 hour work day. However, in the July 28, 2005 addendum Medical Panel Report, Dr. Momberger clarified that the "light to

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[2] A functional capacity evaluation is usually a series of physical tasks conducted by a physical therapist over the course of one or two days to assess a person's physical ability to perform the tasks generally to be applied to a specific job's requirements.

moderate restriction" from Disability Evaluation is based upon an **8-hour day**. Thus, through the July 28, 2005 addendum, the Medical Panel made it clear that Prichard was capable of performing "light to moderate" work for an 8-hour day. Accordingly, Prichard has provided no legal or factual basis for rejection of the Medical Panel's conclusion regarding his permanent work restrictions. There is no case law, statute or rule that suggests work restrictions may only be assigned after a functional capacity evaluation is performed.

Through the Medical Panel Report and the July 28, 2005 addendum, the Medical Panel made it clear that its conclusion with respect to permanent work restrictions was made in reliance upon the Department of Labor Guidelines as set forth in Disability Evaluation, Second Edition, which is published by the American Medical Association. The Medical Panel's opinion was based upon its examination of Prichard in conjunction with all of the medical evidence provided by the Labor Commission. The conclusion was reasonably adopted by the Commission and should not be disturbed.

II. The Administrative Law Judge Properly Determined that Prichard is Not Permanently Totally Disabled.

Permanent total disability claims require a four part analysis under U.C.A. § 34A-2-413(1). The only aspects of the Commission's analysis under attack are its review under subsections (1)(c), primarily subsection (iv), and (d). However, Prichard has misquoted subsection (d) and the Commission's analysis under subsection (c) was appropriate.

A. Evidence of Entitlement to Social Security Disability does not Create a Presumption of Permanent Total Disability.

Prichard argues that the administrative law judge failed to perform the proper analysis under Utah Administrative Rule 612-1-10(D) in determining that he is capable of performing other work reasonably available. Prichard's argument hinges on his misreading of Section 34A-2-413(1)(d). Prichard alleges that the statute provides that the:

> employee's entitlement to disability benefits other than those provided under this chapter . . . may be presented to the commission, but is not binding, **and creates a [sic] presumption to entitlement under this chapter . . .**

(Emphasis by Prichard) Petitioner's Brief at 14. However, the statute, now, and at the time of accident, actually reads as follows:

> Evidence of an employee's entitlement to disability benefits other than those provided under this chapter . . . , if relevant, may be presented to the commission, but is not binding, and creates **no** presumption of an entitlement under this chapter . . .

(Emphasis added). Based on Prichard's misquoting the statute, his argument has no support and should be disregarded.

B. The ALJ Properly Determined that Prichard is Capable of Performing Other Work Reasonably Available.

Prichard also argues that the administrative law judge failed to consider and analyze the acceptable commuting distance and wage requirements pursuant to Rule 612-1-10(D). However, the argument focuses primarily on issues with the vocational expert's

testimony and issues with the medical panel restrictions, the latter having already been addressed.

1. The Evidence Supports a Finding that Other Work was Reasonably Available when Considering both Wage and Location Requirements.

In regards to the location and wage of the other work reasonably available, the record demonstrates that the administrative law judge and the Commission, as the ultimate finder of fact, considered all of the necessary factors and weighed all of the evidence including the testimony of vocational expert Dirk Evertsen, in finding that other work was reasonably available which met the wage and commuting requirements of Rule 612-1-10(D).

During the administrative hearing, vocational expert, Dirk Evertsen, testified that he had identified 44 jobs in the Utah area and 14 in Florida in the sedentary to light category which Prichard was capable of performing. Mr. Evertsen identified 14 jobs in Florida within a 50 mile radius of Prichard's zip code including a loan officer job in the $40,000 to $60,000 range with no experience necessary and another position in the $32,000 to $43,000 range.[3] The Utah Court of Appeals has stated that the identified job or jobs must exist "within a reasonable proximity of [the injured worker's] usual residence or residences." Hoskings v. Industrial Commission, 918 P.2d 150, 158 (Utah App. 1996). Mr. Evertsen's testimony, which was unrebutted, provided evidence that

[3] The State Average Weekly Wage for Prichard's date of injury was $509. Annualized, this equates to $26,468.

other work was available within a typical or acceptable commuting distance from either of Prichard's residences (current or at the time of the accident) and that the available work provides a gross income greater than the current state average weekly wage.

2. The Commission Properly Relied on the Evidence, Including the Medical Panel's Work Restrictions, and Determined That Prichard Could Perform Other Work Was Reasonably Available.

In regards to Mr. Prichard's functional capacity, this argument has been addressed above in responding to Prichard's contentions with the medical panel report. The panel determined, and the Commission accepted, that Prichard is capable of working in the light to moderate category. Based on that ability, Mr. Evertsen testified that appropriate jobs were available. However, in making the argument that he does not have the functional capacity to work, Prichard disregards the medical panel's opinion that he is capable of performing light to moderate work. By definition, as noted by the panel, this includes work up to 35 pounds during an eight hour work day. The panel did not assign any additional restrictions, such as the need to lie down.

The medical dispute over Prichard's functional capacity, i.e., his restrictions, was sent to the panel based on differing opinions from Drs. Bender, Bova and Chung compared to those from Dr. Knorpp. When issues go before a medical panel, the medical dispute can only be resolved in favor of one party. In this case, the panel's opinion was favorable to respondents. Therefore, in his argument, Prichard relies on the restrictions assigned by Dr. Bender only, namely no lifting over 10 pounds and the need to lie down.

Dr. Benders' restrictions do not, however, dictate the functional capacity in this case - the panel's do. Therefore, Prichard's reliance on Dr. Bender's restrictions is misplaced.

Because of the difference in restrictions from the various doctors at the time of the hearing, Mr. Evertsen had to address various possibilities from moderate to sedentary work, with the understanding that if one can work in a certain category, one can always work in a category that is more restrictive, e.g., if one can perform light work, one can also perform sedentary work. In doing so, he testified that Prichard would be capable of performing work in the sedentary to light category, specifically identifying jobs with lifting requirements between 20-25 pounds. (Record Vol. 2 at 46-25 to 47-5).

Based on Mr. Evertsen's testimony that jobs were available to Prichard with lifting of less than 25 pounds, and the medical panel's determination of a 35 pound lifting capability, the Commission properly determined that Prichard had the residual function to perform other work reasonably available.

In short, and as noted above, the administrative law judge, and subsequently the Commission, specifically referenced the definition of "other work reasonably available" under Utah Administrative Rule 612-1-10(D). The administrative law judge further set forth facts addressing the criteria found in Section 34A-2-413(1)(c)(iv): (1) Prichard has the ability to lift up to 35 pounds occasionally and 18 pounds frequently as determined by the Medical Panel (medical and residual functional capacity); (2) Prichard possesses a bachelor's degree in business management (education); (3) Prichard has the ability to sit,

stand, and walk alternately, and was able to sit through both the hearing and the deposition (residual functional capacity); (4) Prichard worked in management for K-Mart supervising 80-90 employees and running a large retail store (past work experience); (5) prior to working for K-Mart, Prichard was in the military and trained as an administrative specialist, running an academic library and maintaining classroom materials, and as a heavy equipment operator (past work experience); (6) Prichard has a high level of education and a significant management background (education and past work experience); (7) the medical panel and vocational expert, Dirk Evertsen, both concluded that the most significant obstacle to Prichard's return to work was his perception of himself as disabled (panel addressed medical and residual functional capacity, and the vocational expert applied those to age, education and past work experience). (Record Vol. 1 at 108). The Commission subsequently found that Prichard, at the time of the Order, was 48 years old. (Record Vol. 1 at 145). Again, these facts establish the criteria set forth in Section 34A-2-413(1)(c)(iv), namely age, education, past work experience, medical capacity and residual functional capacity.

Based upon the foregoing factors, the administrative law judge concluded, and the Commission upheld, that Prichard "has significant education and experience in management to find other employment in business management, human resources and customer service." (Record Vol. 1 at 108). Additionally, the administrative law judge concluded that "Mr. Evertsen identified employment which meets [Prichard's] objective

physical capacity and is reasonably available to him based upon his current skills and education level." (Record Vol. 1 at 108). As outlined above, the evidence obtained from Mr. Evertsen included jobs within a reasonable commuting distance and at wages higher than the current average weekly wage. Based upon the evidence that such jobs existed and were available, the administrative law judge properly concluded that other work was reasonably available to Prichard in accordance with the definition set forth in Utah Administrative Rule 612-1-10(D).

CONCLUSION

The Medical Panel assigned proper work restrictions to Prichard that fell within the light to moderate work categories. The ALJ and Commission properly relied on these restrictions and, in combination with the vocational expert's opinion, concluded that Prichard could perform other work reasonably available. Thus, the Commission's decision is supported by substantial evidence. Entitlement to Social Security Disability does not create a presumption of entitlement to permanent total disability benefits. Therefore, the Commission's decision should be upheld.

DATED this 23 day of Mar, 2009.

RICHARDS BRANDT MILLER NELSON

MARK R. SUMSION
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing instrument were mailed, first-class, postage prepaid, on this 23 day of Nov, 2009, to the following:

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Addendum A

Statutes and Rules

maximum of 66-⅔% of the state average weekly wage at the time of the injury for a total of 312 weeks in compensation be required to be paid. 1997

34A-2-413. Permanent total disability — Amount of payments — Rehabilitation.

(1) (a) In cases of permanent total disability resulting from an industrial accident or occupational disease, the employee shall receive compensation as outlined in this section.

(b) To establish entitlement to permanent total disability compensation, the employee has the burden of proof to show by a preponderance of evidence that:

(i) the employee sustained a significant impairment or combination of impairments as a result of the industrial accident or occupational disease that gives rise to the permanent total disability entitlement;

(ii) the employee is permanently totally disabled; and

(iii) the industrial accident or occupational disease was the direct cause of the employee's permanent total disability.

(c) To find an employee permanently totally disabled, the commission shall conclude that:

(i) the employee is not gainfully employed;

(ii) the employee has an impairment or combination of impairments that limit the employee's ability to do basic work activities;

(iii) the industrial or occupationally caused impairment or combination of impairments prevent the employee from performing the essential functions of the work activities for which the employee has been qualified until the time of the industrial accident or occupational disease that is the basis for the employee's permanent total disability claim; and

(iv) the employee cannot perform other work reasonably available, taking into consideration the employee's age, education, past work experience, medical capacity, and residual functional capacity.

(d) Evidence of an employee's entitlement to disability benefits other than those provided under this chapter and Chapter 3, Utah Occupational Disease Act, if relevant, may be presented to the commission, but is not binding and creates no presumption of an entitlement under this chapter and Chapter 3, Utah Occupational Disease Act.

(2) For permanent total disability compensation during the initial 312-week entitlement, compensation shall be 66-⅔% of the employee's average weekly wage at the time of the injury, limited as follows:

(a) compensation per week may not be more than 85% of the state average weekly wage at the time of the injury;

(b) compensation per week may not be less than the sum of $45 per week, plus $5 for a dependent spouse, plus $5 for each dependent child under the age of 18 years, up to a maximum of four dependent minor children, but not exceeding the maximum established in Subsection (2)(a) nor exceeding the average weekly wage of the employee at the time of the injury; and

(c) after the initial 312 weeks, the minimum weekly compensation rate under Subsection (2)(b) shall be 36% of the current state average weekly wage, rounded to the nearest dollar.

(3) For claims resulting from an accident or disease arising out of and in the course of the employee's employment on or before June 30, 1994:

(a) The employer or its insurance carrier is liable for the initial 312 weeks of permanent total disability compensation except as outlined in Section 34A-2-703 as in effect on the date of injury.

(b) The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 34A-2-410 through 34A-2-412 and Sections 34A-2-501 through 34A-2-507 in excess of the amount of compensation payable over the initial 312 weeks at the applicable permanent total disability compensation rate under Subsection (2)

(c) Any overpayment of this compensation shall be reimbursed to the employer or its insurance carrier by the Employers' Reinsurance Fund and shall be paid out of the Employers' Reinsurance Fund's liability to the employee.

(d) After an employee has received compensation from the employee's employer, its insurance carrier, or the Employers' Reinsurance Fund for any combination of disabilities amounting to 312 weeks of compensation at the applicable permanent total disability compensation rate, the Employers' Reinsurance Fund shall pay all remaining permanent total disability compensation.

(e) Employers' Reinsurance Fund payments shall commence immediately after the employer or its insurance carrier has satisfied its liability under Subsection (3) or Section 34A-2-703.

(4) For claims resulting from an accident or disease arising out of and in the course of the employee's employment on or after July 1, 1994:

(a) The employer or its insurance carrier is liable for permanent total disability compensation.

(b) The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 34A-2-410 through 34A-2-412 and Sections 34A-2-501 through 34A-2-507, in excess of the amount of compensation payable over the initial 312 weeks at the applicable permanent total disability compensation rate under Subsection (2)

(c) Any overpayment of this compensation shall be recouped by the employer or its insurance carrier by reasonably offsetting the overpayment against future liability paid before or after the initial 312 weeks.

(5) Notwithstanding the minimum rate established in Subsection (2), the compensation payable by the employer, its insurance carrier, or the Employers' Reinsurance Fund, after an employee has received compensation from the employer or the employer's insurance carrier for any combination of disabilities amounting to 312 weeks of compensation at the applicable total disability compensation rate, shall be reduced, to the extent allowable by law, by the dollar amount of 50% of the Social Security retirement benefits received by the employee during the same period.

(6) (a) A finding by the commission of permanent total disability is not final, unless otherwise agreed to by the parties, until:

(i) an administrative law judge reviews a summary of reemployment activities undertaken pursuant to Chapter 8, Utah Injured Worker Reemployment Act;

(ii) the employer or its insurance carrier submits to the administrative law judge a reemployment plan as prepared by a qualified rehabilitation provider reasonably designed to return the employee to gainful employment or the employer or its insurance carrier provides the administrative law judge notice that the employer or its insurance carrier will not submit a plan, and

(iii) the administrative law judge, after notice to the parties, holds a hearing, unless otherwise stipulated, to consider evidence regarding rehabilitation and to review any reemployment plan submitted by

the employer or its insurance carrier under Subsection (6)(a)(ii).

(b) Prior to the finding becoming final, the administrative law judge shall order:

(i) the initiation of permanent total disability compensation payments to provide for the employee's subsistence; and

(ii) the payment of any undisputed disability or medical benefits due the employee.

(c) The employer or its insurance carrier shall be given credit for any disability payments made under Subsection (6)(b) against its ultimate disability compensation liability under this chapter or Chapter 3, Utah Occupational Disease Act.

(d) An employer or its insurance carrier may not be ordered to submit a reemployment plan. If the employer or its insurance carrier voluntarily submits a plan, the plan is subject to Subsections (6)(d)(i) through (iii).

(i) The plan may include retraining, education, medical and disability compensation benefits, job placement services, or incentives calculated to facilitate reemployment funded by the employer or its insurance carrier.

(ii) The plan shall include payment of reasonable disability compensation to provide for the employee's subsistence during the rehabilitation process.

(iii) The employer or its insurance carrier shall diligently pursue the reemployment plan. The employer's or insurance carrier's failure to diligently pursue the reemployment plan shall be cause for the administrative law judge on the administrative law judge's own motion to make a final decision of permanent total disability.

(e) If a preponderance of the evidence shows that successful rehabilitation is not possible, the administrative law judge shall order that the employee be paid weekly permanent total disability compensation benefits.

(7) (a) The period of benefits commences on the date the employee became permanently totally disabled, as determined by a final order of the commission based on the facts and evidence, and ends:

(i) with the death of the employee; or

(ii) when the employee is capable of returning to regular, steady work.

(b) An employer or its insurance carrier may provide or locate for a permanently totally disabled employee reasonable, medically appropriate, part-time work in a job earning at least minimum wage provided that employment may not be required to the extent that it would disqualify the employee from Social Security disability benefits.

(c) An employee shall fully cooperate in the placement and employment process and accept the reasonable, medically appropriate, part time work.

(d) In a consecutive four-week period when an employee's gross income from the work provided under Subsection (7)(b) exceeds $500, the employer or insurance carrier may reduce the employee's permanent total disability compensation by 50% of the employee's income in excess of $500.

(e) If a work opportunity is not provided by the employer or its insurance carrier, a permanently totally disabled employee may obtain medically appropriate, part-time work subject to the offset provisions contained in Subsection (7)(d).

(f) (i) The commission shall establish rules regarding the part-time work and offset.

(ii) The adjudication of disputes arising under Subsection (7) is governed by Part 8, Adjudication.

(g) The employer or its insurance carrier shall have the burden of proof to show that medically appropriate part-time work is available.

(h) The administrative law judge may:

(i) excuse an employee from participation in any job that would require the employee to undertake work exceeding the employee's medical capacity and residual functional capacity or for good cause; or

(ii) allow the employer or its insurance carrier to reduce permanent total disability benefits as provided in Subsection (7)(d) when reasonable, medically appropriate, part-time employment has been offered but the employee has failed to fully cooperate.

(8) When an employee has been rehabilitated or the employee's rehabilitation is possible but the employee has some loss of bodily function, the award shall be for permanent partial disability.

(9) As determined by an administrative law judge, an employee is not entitled to disability compensation, unless the employee fully cooperates with any evaluation or reemployment plan under this chapter or Chapter 3, Utah Occupational Disease Act. The administrative law judge shall dismiss without prejudice the claim for benefits of an employee if the administrative law judge finds that the employee fails to fully cooperate, unless the administrative law judge states specific findings on the record justifying dismissal with prejudice.

(10) (a) The loss or permanent and complete loss of the use of both hands, both arms, both feet, both legs, both eyes, or any combination of two such body members constitutes total and permanent disability, to be compensated according to this section.

(b) A finding of permanent total disability pursuant to Subsection (10)(a) is final.

(11) (a) An insurer or self-insured employer may periodically reexamine a permanent total disability claim, except those based on Subsection (10), for which the insurer or self-insured employer had or has payment responsibility to determine whether the worker remains permanently totally disabled.

(b) Reexamination may be conducted no more than once every three years after an award is final, unless good cause is shown by the employer or its insurance carrier to allow more frequent reexaminations.

(c) The reexamination may include:

(i) the review of medical records;

(ii) employee submission to reasonable medical evaluations;

(iii) employee submission to reasonable rehabilitation evaluations and retraining efforts;

(iv) employee disclosure of Federal Income Tax Returns;

(v) employee certification of compliance with Section 34A-2-110; and

(vi) employee completion of sworn affidavits or questionnaires approved by the division.

(d) The insurer or self-insured employer shall pay for the cost of a reexamination with appropriate employee reimbursement pursuant to rule for reasonable travel allowance and per diem as well as reasonable expert witness fees incurred by the employee in supporting the employee's claim for permanent total disability benefits at the time of reexamination.

(e) If an employee fails to fully cooperate in the reasonable reexamination of a permanent total disability finding, an administrative law judge may order the suspension of the employee's permanent total disability benefits until the employee cooperates with the reexamination.

(f) (i) Should the reexamination of a permanent total disability finding reveal evidence that reasonably

raises the issue of an employee's continued entitlement to permanent total disability compensation benefits, an insurer or self-insured employer may petition the Division of Adjudication for a rehearing on that issue. The petition shall be accompanied by documentation supporting the insurer's or self-insured employer's belief that the employee is no longer permanently totally disabled.

(ii) If the petition under Subsection (11)(f)(i) demonstrates good cause, as determined by the Division of Adjudication, an administrative law judge shall adjudicate the issue at a hearing.

(iii) Evidence of an employee's participation in medically appropriate, part-time work may not be the sole basis for termination of an employee's permanent total disability entitlement, but the evidence of the employee's participation in medically appropriate, part-time work under Subsection (7) may be considered in the reexamination or hearing with other evidence relating to the employee's status and condition.

(g) In accordance with Section 34A-1-309, the administrative law judge may award reasonable attorneys fees to an attorney retained by an employee to represent the employee's interests with respect to reexamination of the permanent total disability finding, except if the employee does not prevail, the attorneys fees shall be set at $1,000. The attorneys fees shall be paid by the employer or its insurance carrier in addition to the permanent total disability compensation benefits due.

(h) During the period of reexamination or adjudication if the employee fully cooperates, each insurer, self-insured employer, or the Employers' Reinsurance Fund shall continue to pay the permanent total disability compensation benefits due the employee.

(12) If any provision of this section, or the application of any provision to any person or circumstance, is held invalid, the remainder of this section shall be given effect without the invalid provision or application. 1997

34A-2-414. Benefits in case of death — Distribution of award to dependents — Death of dependents — Remarriage of surviving spouse.

(1) (a) The benefits in case of death shall be paid to one or more of the dependents of the decedent for the benefit of all the dependents, as may be determined by an administrative law judge.

(b) The administrative law judge may apportion the benefits among the dependents in the manner that the administrative law judge considers just and equitable.

(c) Payment to a dependent subsequent in right may be made, if the administrative law judge considers it proper, and shall operate to discharge all other claims.

(2) The dependents, or persons to whom benefits are paid, shall apply the same to the use of the several beneficiaries thereof in compliance with the finding and direction of the administrative law judge.

(3) In all cases of death when:

(a) the dependents are a surviving spouse and one or more minor children, it shall be sufficient for the surviving spouse to make application to the Division of Adjudication on behalf of that individual and the minor children; and

(b) all of the dependents are minors, the application shall be made by the guardian or next friend of the minor dependents.

(4) The administrative law judge may, for the purpose of protecting the rights and interests of any minor dependents the administrative law judge considers incapable of doing so, provide a method of safeguarding any payments due the minor dependents.

(5) Should any dependent of a deceased employee die during the period covered by weekly payments authorized by this section, the right of the deceased dependent to compensation under this chapter or Chapter 3, Utah Occupational Disease Act, shall cease.

(6) (a) If a surviving spouse, who is a dependent of a deceased employee and who is receiving the benefits of this chapter or Chapter 3 remarries, that individual's sole right after the remarriage to further payments of compensation shall be the right to receive in a lump sum the lesser of:

(i) the balance of the weekly compensation payments unpaid from the time of remarriage to the end of six years or 312 weeks from the date of the injury from which death resulted; or

(ii) an amount equal to 52 weeks of compensation at the weekly compensation rate the surviving spouse was receiving at the time of such remarriage.

(b) (i) If there are other dependents remaining at the time of remarriage, benefits payable under this chapter or Chapter 3, Utah Occupational Disease Act, shall be paid to such person as an administrative law judge may determine, for the use and benefit of the other dependents.

(ii) The weekly benefits to be paid under Subsection (6)(b)(i) shall be paid at intervals of not less than four weeks. 1997

34A-2-415. Increase of award to children and dependent spouse — Effect of death, marriage, majority, or termination of dependency of children — Death, divorce, or remarriage of spouse.

If an award is made to, or increased because of a dependent spouse or dependent minor child or children, as provided in this chapter or Chapter 3, Utah Occupational Disease Act, the award or increase in amount of the award shall cease at:

(1) the death, marriage, attainment of the age of 18 years, or termination of dependency of the minor child or children; or

(2) upon the death, divorce, or remarriage of the spouse of the employee, subject to the provisions in Section 34A-2-414 relative to the remarriage of a spouse. 1998

34A-2-416. Additional benefits in special cases.

(1) An administrative law judge may extend indefinitely benefits received by a wholly dependent person under this chapter or Chapter 3, Utah Occupational Disease Act, if at the termination of the benefits:

(a) the wholly dependent person is still in a dependent condition; and

(b) under all reasonable circumstances the wholly dependent person should be entitled to additional benefits.

(2) If benefits are extended under Subsection (1):

(a) the liability of the employer or insurance carrier involved may not be extended; and

(b) the additional benefits allowed shall be paid out of the Employers' Reinsurance Fund created in Subsection 34A-2-702(1). 1997

34A-2-417. Claims and benefits — Time limits for filing — Burden of proof.

(1) Except with respect to prosthetic devices, in nonpermanent total disability cases an employee's medical benefit entitlement ceases if for a period of three consecutive years the employee does not:

(a) incur medical expenses reasonably related to the industrial accident; and

discovered information may be allowed.

R612-1-8. Insurance Carrier/Employer Liability.

A. This rule governs responsibility for payment of workers' compensation benefits for industrial accidents when:

1. The worker's ultimate entitlement to benefits is not in dispute; but

2. There is a dispute between self-insured employers and/or insurers regarding their respective liability for the injured worker's benefits arising out of separate industrial accidents which are compensable under Utah law.

B. In cases meeting the criteria of subsection A, the self-insured employer or insurer providing workers' compensation coverage for the most recent compensable injury shall advance workers' compensation benefits to the injured worker. The benefits advanced shall be limited to medical benefits and temporary total disability compensation. The benefits advanced shall be paid according to the entitlement in effect on the date of the earliest related injury.

1. The self-insured employer or insurance carrier advancing benefits shall notify the non-advancing party(s) within the time periods as specified in rule R612-1-7, that benefits are to be advanced pursuant to this rule.

2. The self-insured employers or insurers not advancing benefits, upon notification from the advancing party, shall notify the advancing party within 10 working days of any potential defenses or limitations of the non-advancing party(s) liability.

C. The parties are encouraged to settle liabilities pursuant to this rule, however, any party may file a request for agency action with the Commission for determination of liability for the workers' compensation benefits at issue.

D. The medical utilization decisions of the self-insured employer or insurer advancing benefits pursuant to this rule shall be presumed reasonable with respect to the issue of reimbursement.

R612-1-9. Compensation Agreements.

A. An applicant, insurance company, and/or employer may enter into a compensation agreement for the purpose of resolving a worker's compensation claim. Compensation agreements must be approved by the Commission. The compensation agreement must be that contained on Form 019 of the Commission forms and shall include the following information:

1. Signatures of the parties involved;

2. Form 122 - Employer's First Report of Injury;

3. Doctor's report of impairment rating;

4. Form 141 - Payment of Benefits Statement.

B. Failure to provide any of the above documentation and forms may result in the return of the compensation agreement to the carrier or self-insured employer without approval.

R612-1-10. Permanent Total Disability.

A. This rule applies to claims for permanent total disability compensation under the Utah Workers' Compensation Act.

1. Subsection B applies to permanent total disability claims

arising from accident or disease prior to May 1, 1995.

2. Subsection C applies to permanent total disability claims arising from accident or disease on or after May 1, 1995.

B. For claims arising from accident or disease on or after July 1, 1988 and prior to May 1, 1995, the Commission is required under Section 34A-2-413, to make a finding of total disability as measured by the substance of the sequential decision-making process of the Social Security Administration under Title 20 of the Code of Federal Regulations, amended April 1, 1993. The use of the term "substance of the sequential decision-making process" is deemed to confer some latitude on the Commission in exercising a degree of discretion in making its findings relative to permanent total disability. The Commission does not interpret the code section to eliminate the requirement that a finding by the Commission in permanent and total disability shall in all cases be tentative and not final until rehabilitation training and/or evaluation has been accomplished.

1. In the event that the Social Security Administration or its designee has made, or is in the process of making, a determination of disability under the foregoing process, the Commission may use this information in lieu of instituting the process on its own behalf.

2. In evaluating industrial claims in which the injured worker has qualified for Social Security disability benefits, the Commission will determine if a significant cause of the disability is the claimant's industrial accident or some other unrelated cause or causes.

3. To make a tentative finding of permanent total disability the Commission incorporates the rules of disability determination in 20 CFR 404.1520, amended April 1, 1993. The sequential decision making process referred to requires a series of questions and evaluations to be made in sequence. In short, these are:

a. Is the claimant engaged in a substantial gainful activity?

b. Does the claimant have a medically severe impairment?

c. Does the severe impairment meet or equal the duration requirement in 20 CFR 404.1509, amended April 1, 1993, and the listed impairments in 20 CFR Subpart P Appendix 1, amended April 1, 1993?

d. Does the impairment prevent the claimant from doing past relevant work?

e. Does the impairment prevent the claimant from doing any other work?

4. After the Commission has made a tentative finding of permanent total disability:

a. In those cases arising after July 1,1994, the Commission shall order initiation of payment of permanent total disability compensation;

b. the Commission shall review a summary of reemployment activities undertaken pursuant to the Utah Injured Worker Reemployment Act, as well as any qualified reemployment plan submitted by the employer or its insurance carrier; and

c. unless otherwise stipulated, the Commission shall hold a hearing to consider the possibility of rehabilitation and reemployment of the claimant pending final adjudication of the claim.

5. After a hearing, or waiver of the hearing by the parties, the Commission shall issue an order finding or denying permanent total

disability based upon the preponderance of the evidence and with due consideration of the vocational factors in combination with the residual functional capacity which the commission incorporates as published in 20 CFR 404 Subpart P Appendix 2, amended April 1, 1993.

C. For permanent total disability claims arising on or after May 1, 1995, Section 34A-2-413 requires a two-step adjudicative process. First, the Commission must make a preliminary determination whether the applicant is permanently and totally disabled. If so, the Commission will proceed to the second step, in which the Commission will determine whether the applicant can be reemployed or rehabilitated.

1. First Step - Preliminary Determination of Permanent Total Disability: On receipt of an application for permanent total disability compensation, the Adjudication Division will assign an Administrative Law Judge to conduct evidentiary proceedings to determine whether the applicant's circumstances meet each of the elements set forth in Subsections 34A-2-413(1)(b) and (c).

(a) If the ALJ finds the applicant meets each of the elements set forth in Subsections 34A-2-413(1)(b) and (c), the ALJ will issue a preliminary determination of permanent total disability and shall order the employer or insurance carrier to pay permanent total disability compensation to the applicant pending completion of the second step of the adjudication process. The payment of permanent total disability compensation pursuant to a preliminary determination shall commence as of the date established by the preliminary determination and shall continue until otherwise ordered.

(b) A party dissatisfied with the ALJ's preliminary determination may obtain additional agency review by either the Labor Commissioner or Appeals Board pursuant to Subsection 34A-2-801(3). If a timely motion for review of the ALJ's preliminary determination is filed with either the Labor Commissioner or Appeals Board, no further adjudicative or enforcement proceedings shall take place pending the decision of the Commissioner or Board.

(c) A preliminary determination of permanent total disability by the Labor Commissioner or Appeals Board is a final agency action for purposes of appellate judicial review.

(d) Unless otherwise stayed by the Labor Commissioner, the Appeals Board or an appellate court, an appeal of the Labor Commissioner or Appeals Board's preliminary determination of permanent total disability shall not delay the commencement of "second step" proceedings discussed below or payment of permanent total disability compensation as ordered by the preliminary determination.

(e) The Commissioner or Appeals Board shall grant a request for stay if the requesting party has filed a petition for judicial review and the Commissioner or Appeals Board determine that:

(i) the requesting party has a substantial possibility of prevailing on the merits;

(ii) the requesting party will suffer irreparable injury unless a stay is granted; and

(iii) the stay will not result in irreparable injury to other parties to the proceeding.

2. Second Step - Reemployment and Rehabilitation: Pursuant to Subsection 34A-2-413(6), if the first step of the adjudicatory process

results in a preliminary finding of permanent total disability, an additional inquiry must be made into the applicant's ability to be reemployed or rehabilitated, unless the parties waive such additional proceedings.

(a) The ALJ will hold a hearing to consider whether the applicant can be reemployed or rehabilitated.

(i) As part of the hearing, the ALJ will review a summary of reemployment activities undertaken pursuant to the Utah Injured Worker Reemployment Act;

(ii) The employer or insurance carrier may submit a reemployment plan meeting the requirements set forth in Subsection 34A-2-413(6)(a)(ii) and Subsections 34A-2-413(6)(d)(i) through (iii).

(b) Pursuant to Subsection 34A-2-413(4)(b) the employer or insurance carrier may not be required to pay disability compensation for any combination of disabilities of any kind in excess of the amount of compensation payable over the initial 312 weeks at the applicable permanent total disability compensation rate.

(i) Any overpayment of disability compensation may be recouped by the employer or insurance carrier by reasonably offsetting the overpayment against future liability paid before or after the initial 312 weeks.

(ii) An advance of disability compensation to provide for the employee's subsistence during the rehabilitation process is subject to the provisions of Subsection 34A-2-413(4)(b), described in subsection 2.(b) above, but can be funded by reasonably offsetting the advance of disability compensation against future liability normally paid after the initial 312 weeks.

(iii) To fund an advance of disability compensation to provide for an employee's subsistence during the rehabilitation process, a portion of the stream of future weekly disability compensation payments may be discounted from the future to the present to accommodate payment. Should this be necessary, the employer or insurance carrier shall be allowed to reasonably offset the amounts paid against future liability payable after the initial 312 weeks. In this process, care should be exercised to reasonably minimize adverse financial impact on the employee.

(iv) In the event the parties cannot agree as to the reasonableness of any proposed offset, the matter may be submitted to an ALJ for determination.

(c) Subsections 34A-2-413(7) and (9) require the applicant to fully cooperate in any evaluation or reemployment plan. Failure to do so shall result in dismissal of the applicant's claim or reduction or elimination of benefit payments including disability compensation and subsistence allowance amounts, consistent with the provisions of Section 34A-2-413(7) and (9).

(d) Subsection 34A-2-413(6) requires the employer or its insurance carrier to diligently pursue any proffered reemployment plan. Failure to do so shall result in a final award of permanent total disability compensation to the applicant.

(e) If, after the conclusion of the foregoing "second step" proceeding, the ALJ concludes that successful rehabilitation is not possible, the ALJ shall enter a final order for continuing payment

of permanent total disability compensation. The period for payment of such compensation shall be commence on the date the employee became permanently and totally disabled, as determined by the ALJ.

(f) Alternatively, if after the conclusion of the "second step" proceeding, the ALJ concludes that successful rehabilitation and/or reemployment is possible, the ALJ shall enter a final order to that effect, which order shall contain such direction to the parties as the ALJ shall deem appropriate for successful implementation and continuation of rehabilitation and/or reemployment. As necessary under the particular circumstances of each case, the ALJ's final order shall provide for reasonable offset of payments of any disability compensation that constitute an overpayment under Subsection 34A-2-413(4)(b).

(g) The ALJ's decision is subject to all administrative and judicial review provided by law.

D. For purposes of this rule, the following standards and definitions apply:

1. Other work reasonably available: Subject to medical restrictions and other provisions of the Act and rules, other work is reasonably available to a claimant if such work meets the following criteria:

a. The work is either within the distance that a resident of the claimant's community would consider to be a typical or acceptable commuting distance, or is within the distance the claimant was traveling to work prior to his or her accident;

b. The work is regular, steady, and readily available; and

c. The work provides a gross income at least equivalent to:

(1) The current state average weekly wage, if at the time of the accident the claimant was earning more than the state average weekly wage then in effect; or

(2) The wage the claimant was earning at the time of the accident, if the employee was earning less than the state average weekly wage then in effect.

2. Cooperation: As determined by an administrative law judge, an employee is not entitled to permanent total disability compensation or subsistence benefits unless the employee fully cooperates with any evaluation or reemployment plan. The ALJ will evaluate the cooperation of the employee using, but not limited to, the following factors: attendance, active participation, effort, communication with the plan coordinator, and compliance with the requirements of the vocational plan. In determining if these factors were met, the ALJ shall consider relevant changes in the employee's documents medical condition.

3. Diligent Pursuit: The employer or its insurance carrier shall diligently pursue the reemployment plan. The ALJ will evaluate the employer or insurance carrier's diligent pursuit of the plan using, but not limited to, the following factors: timely payment of expenses and benefits outline in the vocational plan, and as required by the educational institution providing the vocational training, communication with the employee, compliance with the requirements of the vocational plan, and timely modification of the plan as required by documented changes in the employee's medical condition.

4. Resolution of disputes regarding "cooperation" and "diligent

pursuit": If a party believes another party is not cooperating with or diligently pursing either the evaluations necessary to establish a plan, or the requirements of an approved reemployment or rehabilitation plan, the aggrieved party shall submit to the workers' compensation mediation unit an outline of the specific instances of non-cooperation or lack of diligence. Other parties may submit a reply. The Mediation Unit will promptly schedule mediation to reestablish cooperation among the parties necessary to evaluate or comply with the plan. If mediation is unsuccessful, a party may request the Adjudication Division resolve the dispute. The Adjudication Division will conduct a hearing on the matter within 30 days and shall issue a written decision with 10 days thereafter.

R612-1-11. Burial Expenses.

(1) Pursuant to Section 34A-2-418 if death results from an industrial injury or occupational disease, burial expenses in ordinary cases shall be paid by the employer or insurance carrier up to $8,000. Unusual cases may result in additional payment, either voluntarily by the employer or insurance carrier or through commission order.

(2) Beginning in the year 2004 and every two years thereafter, the Commission shall review this rule and shall make such adjustments as are necessary so that the burial expense provided by this rule remains equitable when compared to the average cost of burial in this state.

KEY: workers' compensation, time, administrative procedures, filing deadlines
Date of Enactment or Last Substantive Amendment: July 2, 2005
Notice of Continuation: August 15, 2007
Authorizing, and Implemented or Interpreted Law: 34A-2-101 et seq.; 34A-3-101 et seq.; 34A-1-104 et seq.; 63-46b-1 et seq.

Addendum B

"Order Affirming ALJ's Decision" dated October 31, 2007

UTAH LABOR COMMISSION

RICHARD D. PRICHARD, **Petitioner,** **vs.** **K-MART,** **Respondent.**	**ORDER AFFIRMING ALJ'S DECISION** **Case No. 03-0493**

Richard D. Prichard asks the Utah Labor Commission to review Administrative Law Judge Marlowe's denial of Mr. Prichard's claim for permanent total disability benefits under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Annotated).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63-46b-12 and § 34A-2-801(3).

BACKGROUND AND ISSUES PRESENTED

On June 7, 2000, Mr. Prichard injured his back while working for K-Mart. K-Mart accepted liability for the injury under the Utah Workers' Compensation Act and paid Mr. Prichard's medical expenses, temporary disability compensation and permanent partial disability compensation. On May 6, 2003, Mr. Prichard filed an application with the Commission to compel K-Mart to also pay permanent total disability compensation.

Judge Marlowe held an evidentiary hearing on Mr. Prichard's claim and then appointed an impartial medical panel to consider the medical aspects of the claim. After receiving the panel's initial and supplemental reports, Judge Marlowe accepted the panel's findings and, relying on those findings and other evidence of record, concluded that Mr. Prichard's circumstances did not meet the Act's standards for a preliminary determination of permanent total disability.

In challenging Judge Marlowe's decision, Mr. Prichard argues that: 1) the medical panel did not properly evaluate Mr. Prichard's residual functional capacity; and 2) Judge Marlowe did not properly analyze Mr. Prichard's claim according to the requirements of § 34A-2-413(1) of the Act and associated Commission rules.

FINDINGS OF FACT

The Commission adopts Judge Marlowe's findings of fact, as supplemented by the additional findings included in this decision and summarized as follows.

Mr. Prichard is 48 years old and currently lives in Florida. He has a bachelor's degree in business management as well as retail sales management experience. He also has military experience and training as an administrative specialist and librarian. At the time of the accident which gives rise to this claim for permanent total disability compensation, K-Mart employed Mr. Prichard as a manager.

On June 7, 2000, Mr. Prichard was involved in a lifting accident at K-Mart. As a result of this accident, he suffered a herniated disc at the L4-5 level of his spine. He underwent surgery on August 21, 2000, and experienced some temporary improvement. However, the pain in his back and legs returned. Since then, Mr. Prichard has received pain medication, physical therapy, steroid injections and pain management training.

Mr. Prichard's back injury left him with a permanent 10% whole person impairment. He cannot: 1) lift and carry more than 35 pounds; 2) lift and carry more than 18 pounds "frequently"; or 3) lift and carry more than 9 pounds "constantly". He is also restricted from bending, stooping, squatting and climbing, and must be able to occasionally move from standing to sitting positions. The Social Security Administration has found Mr. Prichard totally disabled and entitled to social security total disability benefits.

Despite the physical problems and limitations that stem from Mr. Prichard's work-related injury, his age, education, past work experience, and remaining medical and functional capacity qualify him to perform other work that is reasonably available to him, both in Florida and in Utah. Specifically, there are substantial numbers of available jobs in sales, retail and finance that are within Mr. Prichard's physical abilities, and for which he is qualified by education, experience and training. These positions appear to be relatively well-paying, with at least some offering annual salaries of approximately $40,000.

DISCUSSION AND CONCLUSION OF LAW

As already noted, Mr. Prichard challenges Judge Marlowe's decision on two grounds. First, he challenges the adequacy of the medical panel's evaluation. Next, he contends that Judge Marlowe did not properly evaluate his claim under the governing provisions of the Utah Workers' Compensation Act. These arguments are addressed below.

Adequacy of medical panel evaluation. Mr. Prichard argues that the medical panel's opinion regarding his physical abilities is not supported by any functional capacity testing. Mr. Prichard also argues that the panel did not explain the basis for its opinion. In considering these points, the Commission notes that the medical panel consisted of three respected experts in the fields of orthopedics, neurology and psychiatry. These panelists reviewed Mr. Prichard's entire medical history, including the reports and opinions of Mr. Prichard's own treating physicians. Finally, the panelists personally examined Mr. Prichard. Based on all this information, and after consulting appropriate professional guidelines for the evaluation of disability, the panel concluded that Mr.

Prichard's abilities placed him in a "light-to-medium" classification, with the lifting restrictions set forth in this decision's findings of fact. In light of the medical panel's expertise and its thorough review of Mr. Prichard's case, the Commission finds the panel's opinion to be well-supported and adequately explained.

The Commission also notes Mr. Prichard's argument that Judge Marlowe was obligated to hold a hearing to consider the parties' objections to the panel's report. However, § 34A-2-601(2)(f)(i) of the Act permits but does not require an ALJ to hold a hearing on such objections. In other words, the statute grants the ALJ discretion to determine whether a medical panel hearing is necessary. The Commission agrees with Judge Marlowe's judgment that no such hearing was required in this case.

Application of Act to Mr. Prichard's claim. Mr. Prichard seeks a preliminary determination by the Commission that he is permanently and totally disabled. Section 34A-2-413(1)(c)(iv) of the Utah Workers' Compensation Act is the governing statute and provides as follows:

> (c) To find an employee permanently totally disabled, the commission shall conclude that:
> (i) the employee is not gainfully employed;
> (ii) the employee has an impairment or combination of impairments that limit the employee's ability to do basic work activities;
> (iii) the industrial . . . impairments prevent the employee from performing the essential functions of the work activities for which the employee has been qualified until the time of the industrial accident . . . ; and
> (iv) the employee cannot perform other work reasonably available, taking into consideration the employee's:
> (A) age;
> (B) education;
> (C) past work experience;
> (D) medical capacity;
> (E) residual functional capacity.

Judge Marlowe determined that, although Mr. Prichard met the requirements of § 413(1)(c)(i) through (iii), he did not satisfy § 413(1)(c)(iv)'s requirement that he be unable to "perform other work reasonably." Mr. Prichard now argues that Judge Marlowe failed to apply the analysis required by § 413(1)(c)(iv) and the Commission's Rule R612-1-10.D.

Rule 612-1-10.D.1 identifies the subsidiary facts that will be considered in determining whether "other work is reasonably available" to an injured worker, as follows:

1. Other work reasonably available: Subject to medical restrictions and other provisions of the Act and rules, other work is reasonably available to a claimant if such work meets the following criteria:

a. The work is either within the distance that a resident of the claimant's community would consider to be a typical or acceptable commuting distance, or is within the distance the claimant was traveling to work prior to his or her accident;

b. The work is regular, steady, and readily available; and

c. The work provides a gross income at least equivalent to:

(1) The current state average weekly wage, if at the time of the accident the claimant was earning more than the state average weekly wage then in effect; or

(2) The wage the claimant was earning at the time of the accident, if the employee was earning less than the state average weekly wage then in effect.

The Commission agrees with Mr. Prichard's assertion that Judge Marlowe's decision does not identify or evaluate the "other work" that may be available for Mr. Prichard. The Commission has therefore addressed that issue by including additional findings of fact in this decision. As noted in those supplemental findings, the evidentiary record establishes that work is available to Mr. Prichard that is within his medical and functional abilities, is reasonably close to his current residence and his former work location in Utah, and pays a sufficient wage. This work is also consistent with Mr. Prichard's education, training and experience. With these additional facts, the Commission concurs with Judge Marlowe's ultimate determination that Mr. Prichard has not met his burden of proving that he cannot perform other work reasonably available to him, as required by § 34A-2-413(1)(c)(iv). Consequently, Mr. Prichard is not entitled to a preliminary finding of permanent total disability.

ORDER

The Commission affirms Judge Marlowe's decision. It is so ordered.

Dated this 31st day of October, 2007.

Sherrie Hayashi
Utah Labor Commissioner

IMPORTANT! NOTICE OF APPEAL RIGHTS FOLLOWS ON NEXT PAGE.

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Affirming ALJ's Decision in the matter of Richard D. Prichard, Case No. 03-0493, was mailed first class postage prepaid this 31st day of October, 2007, to the following:

Richard D. Prichard
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Salt Lake City UT 84110

Sara Danielson
Utah Labor Commission

Addendum C

"Findings of Fact, Conclusions of Law, and Order" dated October 17, 2005

UTAH LABOR COMMISSION
ADJUDICATION DIVISION
PO Box 146615
Salt Lake City, Utah 84114-6615
801-530-6800

RICHARD D PRICHARD, **Petitioner,** **vs.** **K MART,** **Respondent.**	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Case No. 2003493** **Judge Deidre Marlowe**

HEARING: January 20, 2004.

BEFORE: Deidre Marlowe, Administrative Law Judge.

APPEARANCES: Richard D. Prichard was represented by David K. Smith
Kmart, was represented by attorney Mark Sumsion

Richard D. Prichard filed an application for hearing on May 6, 2003 alleging an injury date of June 7, 2000 and requesting permanent total compensation. The Respondents filed an answer on June 3, 2003 admitting that Petitioner suffered an injury in the course and scope of his employment as alleged, for which they have paid various benefits, but defending on the grounds that Petitioner is not permanently and totally disabled. The parties stipulated that all appropriate benefits have been paid up through July 25, 2002.

Findings of Fact and Conclusions of Law were issued on March 5, 2005 referring the medical aspects of this case to a Commission medical panel. The panel issued its report on June 8, 2005 and it was forwarded to the parties via certified mail on June 9, 2005. The petitioner filed a timely objection to the panel's report. The undersigned requested clarification of the panel's report which was issued on August 15, 2005 and mailed to the parties via certified mail on September 20, 2005. The petitioner filed a timely objection to the panel's report.

OBJECTIONS TO THE MEDICAL PANEL REPORT

Utah Code § 34A-2-601 contains the procedures for Labor Commission medical panels. Section 34A-2-601(2)(d)(i) requires the ALJ to "promptly distribute full copies of the report...by certified mail . . . ." Section 34A-2-601(2)(ii) and (iii) outline the objection process and state:

> (ii) Within 15 days after the report described in Subsection (2)(d)(i) is deposited in the United States post office, the following may file with the administrative law judge written objections to the

and administered steroid injections, which gave some relief. He also gave the Petitioner a V-lok brace. ME p. 64.

Petitioner was evaluated by Scot Russell, Ph.D. June 27, 2001, who gave the green light on the Petitioner's admission to a pain management program.

Petitioner was evaluated by Dr. Jeff Chung on August 29, 2001, who acknowledged his condition of failed back syndrome, and who indicates that Petitioner did not show the appearance of malingering, hysteria, conversion reaction or symptom magnification. ME p. 153. Dr. Chung concludes that Petitioner has less than a 1% chance of having improvement in his symptoms to the point of being able to find work in the competitive job market or weaning himself from narcotics. ME p. 154. Dr. Chung believes a fusion surgery would only worsen the condition. Dr. Chung rates the Petitioner with a 13% whole person impairment, which includes consideration of both the back and leg radiculopathy. ME p. 155.

On January 17, 2002 Dr. Bova's restrictions were limited sitting, standing, bending stooping, twisting and that he was not capable of working full time in a primarily seated position with the option to stand if needed, in short, "pt is totally disabled." ME p. 75.

On November 26, 2002 Dr. Scott Knorpp evaluated the Petitioner and concluded that Petitioner suffered failed back syndrome with symptom magnification syndrome. Dr. Knorrp indicates that Petitioner is not getting any true benefits from his pain medications, and furthermore that continued injections are not medically reasonable. Fusion surgery is recommended against. In a subsequent report, Dr. Knorpp notes Petitioner's unwillingness to put forth a valid effort during his functional capacity evaluation, and because of that there is no sound medical foundation to introduce permanent physician imposed restrictions with regard to work. ME p. 198. Dr. Knorpp opines that there is no medical reason that the Petitioner cannot return to work.

Petitioner was independently evaluated by Dr. John Barbuto on December 12, 2002. Dr. Barbuto notes the Petitioner has clear disc herniation, but also notes "obviously excessive pain melodrama" from the Petitioner prior to and during the exam. Dr. Barbuto thinks the condition is social posturing rather than a logical biological conclusion and diagnoses a biopsychosocial pain syndrome. ME p. 204, 209. Also a 10% impairment rating is assessed. ME p. 211.

The Petitioner began seeing Dr. Daniel Bender in October 2003. Dr. Bender diagnosed chronic low back pain and secondary depression, and prescribed ongoing Oxycontin and other drugs. ME p. 221. He also administered nerve blocks. On December 21, 2003 Dr. Bender's restrictions were given as: no lifting more than 10 pounds, no standing more than 30 minutes, no sitting more than 30 minutes, no bending, stooping, squatting, and the need to lie down frequently. ME p. 231. The January 24, 2004 restriction form indicates "unable to work." ME p. 230.

Petitioner received a Social Security disability finding with payments beginning August 21, 2000 for his lumbar spine injury and back problems. He currently takes 40 mg. Oxycontin 3 times a day, Neurontin, Percocet for breakthrough pain, Tisdone, and Lexapril, an antidepressant.

The petitioner is unable to perform his former work as retail store manager as the result of the work related injury. The petitioner's job as a store manager required him to assist in unloading trucks and lift items of stock, and to walk, stand, lift and carry beyond his current physical restrictions.

The petitioner can perform other work reasonably available. The petitioner is now 46 years old and he possesses a bachelor's degree in business management. The petitioner has the ability to sit, stand and walk alternately and was able to sit through both the hearing and the deposition. The petitioner has the ability to lift up to 35 pounds occasionally and 18 pounds frequently. The petitioner worked in management for Kmart supervising 80-90 employees and running a large retail store. Prior to working for Kmart, the petitioner was in the military and trained as an administrative specialist, running an academic library and maintaining classroom materials, and as a heavy equipment operator. The petitioner possesses a high level of education and a significant management background. The petitioner has not attempted to seek other employment and both the medical panel and Dirk Evertson noted that the most significant obstacle to the petitioner's return to employment was his perception of himself as disabled. The petitioner's medical restrictions do not prevent him from working in a light category of employment and he has significant education and experience in management to find other employment in business management, human resources and customer service. Mr. Evertson identified employment which meets the petitioner's objective physical capacity and is reasonably available to him based upon his current skills and education level.

The petitioner is not permanently totally disabled as the result of his industrial injury.

PRINCIPLES OF LAW

Utah Code Ann. § 34A-2-401 provides that only those injuries arising out of and in the course of employment are compensable under the Workers Compensation Act. Allen v. Industrial Commission, 729 P.2d 15, 18 (Utah 1986), held the statute [current section 34A-2-401] "...creates two prerequisites for a finding of a compensable injury. First, the injury must be 'by accident.' Second, the language 'arising out of or in the course of employment' requires that there be a causal connection between the injury and the employment."

For an injury to be compensable under the Act, a petitioner must show by evidence, opinion or otherwise that the stress, strain or exertion required by his or her occupation led to the resulting injury or disability and in the event a petitioner cannot show a medical causal connection, compensation should be denied. Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986).

Utah Code Ann. § 34A-2-413 states in relevant part:

> (1) (a) In cases of permanent total disability resulting from an industrial accident or occupational disease, the employee shall receive compensation as outlined in this section.
>
> (b) To establish entitlement to permanent total disability compensation, the employee has the burden of proof to show by a preponderance of evidence that:

CONCLUSIONS OF LAW

The petitioner suffered a compensable industrial injury on June 7, 2000 while employed by the respondent, KMart.

The petitioner is not permanently totally disabled as the result of the June 7, 2000 industrial injury.

The petitioner's application for hearing is dismissed with prejudice.

ORDER

IT IS THEREFORE ORDERED the petitioner's application for hearing is dismissed with prejudice.

DATED October 17, 2005.

Deidre Marlowe
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its response. If none of the parties specifically request review by the Appeals Board, the review will be conducted by the Utah Labor Commission.